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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 316

JAMES DONALD EDWARDS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 5- ..... It is also set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on June 21, 1968 [R. 7];* also see Appendix B to this petition. This Petition for Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED AND HOW RAISED

The sole question presented is whether a Selective Service System registrant, presenting a prima facie claim for a conscientious objector classification but not perfecting an administrative appeal after a local board rejection is, nevertheless, entitled to defend a prosecution for failure to submit to induction on the basis that he was misclassified contrary to all the evidence before the board.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix C.

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*R. refers to the Record of Proceedings in the Court of Appeals.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C.App. § 462 [Tr. 2];* that he became a registrant of Local Board No. 115 of the Selective Service System in the County of Los Angeles, State of California and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 115 to submit to induction into the armed services of the United States [Tr. 2].

Petitioner pleaded not guilty, waived jury trial and was tried on February 6, 1967 [Tr. 24]. A written motion for judgment of acquittal was filed [Tr. 21-22]. The motion was denied and the petitioner was found guilty on February 20, 1967, and thereafter was sentenced and admitted to bail pending appeal [Tr. 30].

6. THE FACTS

Petitioner registered with Local Board No. 115 on January 16, 1963 [Ex. 1-2].**

On April 8, 1964 he executed and filed the Classification Questionnaire (SSS Form No. 100), answering all questions that were applicable to him [Ex. 4-11].

On April 8, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and signed Series VIII [Ex. 7] indicating he was a conscientious objector.

He was mailed the Special Form for Conscientious Objector (SSS Form No. 150) and timely returned it, fully

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*Tr. refers to the Transcript of Record (trial level).

**Ex. refers to the Government's Exhibit, the selective service file of appellant. The pagination is ordinarily pencilled at the bottom of each sheet of the exhibit.

executed [Ex. 12-15]. In this form he showed he was one of Jehovah's witnesses and believed in a Supreme Being and, in an appended statement (the spaces provided on the form for answers being only a few lines each) showed that his religious beliefs took precedence over any earthly command, the origin of his beliefs being "a thorough study of the Bible with my family" and, in all other respects made as full a showing as is possibly required, presenting at the very least a prima facie case [Ex. 16].

Nevertheless, despite anything in the file to the contrary, or in existence, he was classified in Class I-A and subsequently ordered to report for induction.

7. REASONS FOR GRANTING WRIT

The sole question raised by the petitioner calls for a definitive answer to the oft-raised question: is a Selective Service System registrant entitled to a defense in court, on a claim of an arbitrary ignoring of an unrebutted prima facie case for a conscientious objector classification, despite the fact he took no administrative appeal?

The question is one of national import because thousands of registrants are in the predicament of petitioner: they are young and inexperienced, and are given wholly insufficient warning or information on the subject of how to help themselves get ready for court contest.

8. ARGUMENT

The argument is being divided into two parts:

(1) A prima facie case was presented, and

(2) It is unfair to block a defendant, situated as this petitioner, from presenting his defense in a criminal case.

(1) The Prima Facie Case

Section 6 (j) of Title 1 of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456 (j)), provides:

> "Nothing contained in this title . . . shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ."

Section 1622.14 (A) of the Selective Service Regulations [32 C.F.R. 1622.14 (A)] provides:

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work, Contributing to the Maintenance of the National Health, Safety or Interest.—(A) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The local board's duties and the courts' scope of review in draft cases were spelled out by this Court in *Dickinson* v. *United States*, 74 S. Ct. 152, 157, 158, 346 U.S. 389 (1953):

> "The task of the courts in cases such as this is to search the record for some affirmative evidence to support the local board's overt or implicit finding that a registrant has not painted a complete or accurate picture of his activities. . . . If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not interfere. Nor will the courts apply the test of 'substantial evidence'.

However, the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."

". . . when the uncontroverted evidence supporting the registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

The dissenting opinion of Mr. Justice Jackson put the proposition more bluntly (74 S. Ct. 152, 159):

". . . Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case. . . ."

In the present case, petitioner made out a prima facie case for a I-O classification when he filed with the local board his Form 150 in which he claimed conscientious objection to war in any form based upon religious training and belief.

The government's case (the appellant's Selective Service file placed in evidence as the government's exhibit) is totally barren of any evidence whatsoever tending to cast the slightest doubt on appellant's sincerity.

Petitioner claimed membership in the Watchtower Society as one of Jehovah's witnesses.

The Court may take judicial notice of the fact that although Jehovah's witnesses usually have trouble later in the administrative procedure, because of their claim to be ministers, they almost never have trouble getting a I-O classification. There is not a single shred of evidence in the record to cast doubt on appellant's bona fide membership in Jehovah's witnesses and belief in their creed.

Thus the local board's denial of I-O classification to petitioner was without basis in fact and upholding that arbitrary classification would be contrary to the rule of law as set forth in *Dickinson*, or at least, its spirit.

(2) The Unfairness of the Blocking of a Defense

This refers to the judge-made law, namely, the doctrine of exhaustion of administrative remedies.

Our argument, in brief, is that what the courts have constructed they may limit. We will show they have already done so, sometimes explicitly, sometimes implicitly.

A. Intent of Congress

Although Congress clearly intended to expeditiously raise an army, and not to permit undue, delaying litigation, it also clearly declared that the procedures for raising this citizen (conscript) army were to be fair and just:

Item: Congress declared in § 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "*Nothing* contained in this Title shall be construed to require *any* person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." (Emphasis added).

Item: Congress declared in Sec. 1 of the Act: "Policy and intent of Congress:

> (c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

B. The Procedures

Pursuant to the act, regulations were adopted [32 C.F.R. § 1600, et seq.] that give the administrative procedures.

These provide for classification action by the local board and for an administrative agency appeal, to a state appeal board.

The notification of the right to an administrative appeal is faulty and the notifications given prior to March 1967 were severely criticized by the National Advisory Commission on Selective Service (the Burke Marshall report): In Pursuit of Equity: WHO SERVES WHEN NOT ALL SERVE?

After this report, by a change in the regulations, an additional notice has been sent registrants whose claims are rejected by the local board.

Petitioner was processed before this procedural improvement [Ex. 11]. A failure to appeal by one processed before the corrective change deserves some indulgent consideration. However, petitioner does not depend on this factor but argues, next, that the exhaustion doctrine should not be applied to such persons.

C. Use of the Exhaustion Doctrine in Draft Cases Is Unfair

The chief purpose of the doctrine of exhaustion of administrative remedy is to relieve the courts of a burden better borne by specialists in the various administrative agencies.

The doctrine was not formulated to deprive young men, unassisted by counsel, of their day in court: cf. *Cox* v. *Wedemeyer*, 192 F.2d 920, where the Ninth Circuit pointed out that, ". . . the procedure established . . . was

designed to fit the needs of registrants unskilled in legal procedure . . . and none of them represented by counsel." [922-923]

The doctrine of exhaustion of administrative remedies should not be considered inflexible. Many special circumstances should excuse the registrant. This general proposition was restated in *United States* v. *Harvey*, 131 F. Supp. 493:

> ". . . the rule that administrative relief must be exhausted before resorting to the courts did not originate in the constitution, or any statute, but came into being simply as a point of judicial policy adopted by the courts, and the courts do not recognize that it must always be applied in hidebound fashion. The rule will be passed by, if there is good reason for making an exception, and that has been done by both the federal and state courts." [496]

So, in *U. S. ex rel. Filomio* v. *Powell*, 38 F. Supp. 183, on page 187, the Court observed:

> "Evidence is conflicting as to whether Filomio demanded the questionnaire in order that he might perfect his appeal. We do not feel that it was readily available, and hence his omission in this respect was beyond his control."

In *United States ex rel. Beye* v. *Downer*, 143 F.2d 125, the court concluded that it was the local board's fault that Beye had been deprived of an appeal. In *United States* v. *Giessel*, 129 F. Supp. 223, a similar conclusion was reached.

Even where the selective service agency is wholly without fault, the registrant can be permitted to present his facts in court. This is the holding in an old draft case, *Ex parte Cohen*, 254 Fed. 711:

> "He ought not to be denied his rights to habeas corpus, where his personal liberty and nationality are involved because of his failure to do a vain thing." [p. 713]

Certainly where jurisdictional grounds are urged, the registrant should be permitted to present his case in court. The three-judge-minority opinion in *United States* v. *Palmer*, 3d Cir., 1955, 223 F.2d 893, emphasized a point included in one that petitioner Edwards raised: A classification without basis in fact is beyond the jurisdiction of the local board and a defense based on such lack of jurisdiction is permitted by *Estep* v. *United States*, 327 U.S. 114. The Second Circuit, also, had expressed grave doubts that a registrant could be denied the opportunity to present his facts in court, ". . . where, on undisputed facts, the Boards' lack of jurisdiction is manifest." *Schwartz* v. *Strauss*, 206 F.2d 767.

It was early established that the selective service administrative process is a continuous one, beginning with registration and ending at the induction ceremony. *Falbo* v. *United States*, 320 U.S. 549; *Estep, supra.* The administrative process is like a ladder; the registrant must go to the very end [Edwards did; he reported at the induction station], but is there a requirement that he step on every rung? No. For example, who would contend a selective service defendant is not entitled to present his defenses if he did everything except ask for a Personal Appearance Hearing? Yet the Personal Appearance Hearing is the most important rung in the ladder, for it is the only opportunity the board ever has to look the registrant in the eye and hear his views for deferment.

This Court's Selective Service cases lay down no inflexible rule of exhaustion and a mandatory rule is contrary to the general rule of exhaustion of administrative remedies requirement which has been formulated by this Court as a flexible rule.

In *Falbo, supra,* "petitioner urged that the District Court had erred in refusing to permit a trial de novo on

the merits of his claimed exemption." The Board had classified a Jehovah's witness as a conscientious objector rather than a minister. Since, at that time, the order to report to a Civilian Public Service camp was not the final step in classification (he was later physically examined and might be rejected and placed in Class IV-F), the Court viewed the order to report as "an intermediate step" and not reviewable (as intermediate orders are usually not reviewable). The Court did not even refer to "exhaustion". It framed the issue and its ruling thus:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.
>
> "We think it has not." (320 U.S. at 554).

In *Billings* v. *Truesdell*, 321 U.S. 542 (1945), the issue again was not the rule of exhaustion of remedies. A registrant was denied a classification as a conscientious objector. He reported to the army when directed to, but refused to submit to induction. The army claimed Billings was subject to military jurisdiction. The Court held he was not. In explaining that Billings had tried to complete the selective service process as outlined in the *Falbo* case, the Court for the first time referred to "exhaustion". The Court definitely did not extensively consider the rule; it did not lay down a mandatory rule; it merely said:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his

administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the Falbo case. . . ." (321 U.S. at 558).

Again in the *Estep* case (1946), the Supreme Court did not decide that a person must exhaust administrative remedies. The real issue was whether Selective Service classifications could be reviewed in criminal prosecution.

On the other hand, if the Selective Service cases be deemed to lay down a mandatory rule requiring exhaustion of administrative remedies, in all instances, then they are an anachronism in the law—for in all other fields the courts have stated the exhaustion rule as a flexible requirement:

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 773, 91 L.Ed. 1796 (1947).

> ". . . Whether it (the Court) should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion." *U. S.* v. *Abilene & So. Ry. Co.*, 256 U.S. 274, 68 L.Ed. 1016 (1924).

> ". . . In construing the Act, however, we must be mindful of the 'long-established rule of judicial administration that no one is entitled to judicial relief for a supposed' or threatened injury until the prescribed administrative remedy has been exhausted.' Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51. But this rule does not automatically require that judicial review must always be denied where rehear-

ing is authorized but not sought. This is shown by our past decisions (citing cases) from which we see no reason to depart." *Levers* v. *Anderson*, 326 U.S. 219, 222, 90 L.Ed. 26 (1945).

"A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before completion of the administrative process." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434, 92 L.Ed. 784 (1948).

Professor Kenneth Culp Davis, the recognized authority, in his book, Administrative Law (West Publishing Co.), says this of the exhaustion rule:

"The courts usually follow what the Supreme Court calls, 'the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' But even though the Supreme Court customarily states the rule without qualification, the courts in many cases relax the rule. To determine when the rule will be or should be applied or relaxed requires analysis not merely of holdings but also of reasons behind the holdings. . . .

"The principal reasons for requiring exhaustion of administrative remedies relate to efficient management and orderly procedure, use of the agency's specialized understanding, adequacy of legal remedies, exclusive jurisdiction, and statutory requirements of final order." (Davis, p. 615).

In *Ex parte Fabiani*, 105 F. Supp. 139 (1952), E. D. Penna., a medical student in Italy was allowed to defend against a I-A classification though he had not exhausted his administrative remedies. (He not only had not appealed, but he had not reported for physical examination

or for induction.) The Court cited case after case where lack of due process and clear error of law were defenses to prosecution for selective service violations and concluded that exhaustion was excused under these cases.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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